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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969
NO. 1518

J. ROBERT HUIE,
Petitioner

vs.

BOARD OF COMMISSIONERS OF THE
ALABAMA STATE BAR,
Respondent

BRIEF OF RESPONDENT

Introduction

This Brief of Respondent is filed in opposition to a Petition for Writ of Certiorari to the Supreme Court of Alabama. The Respondent respectfully submits that the Petitioner has failed to present any federal question of substance not heretofore determined by this Court or decided in a way probably not in accord with applicable decisions of this Court.

QUESTION PRESENTED

The Respondent submits that the question presented is more clearly and accurately stated as follows:

> Does the due process clause of the Fourteenth Amendment, United States Constitution, prohibit the Supreme Court of Alabama from enacting Rules Governing the Conduct of Attorneys in Alabama proposed by the Board of Commissioners of the Alabama State Bar; prevent the Alabama State Bar, acting through its committees and officers who are not members of the Board, from investigating, charging, and prosecuting an attorney for violations of the Rules; and prevent the Board of Commissioners of the Alabama State Bar from determining guilt or innocence where the Supreme Court of Alabama has independently reviewed the record with no presumptions as to the correctness of the Board's findings of law or fact?

Constitutional Provisions, Statutes and Rules Involved

In addition to the constitutional provisions, statutes and rules set forth in the Appendix to the Petition for Writ of Certiorari, the Respondent calls the following to the attention of the Court as set forth below in the Argument and Appendix to this Brief of Respondent:

1. Rule 8, Revised Rules of the Supreme Court of the United States

2. Rule 46 (b), Federal Rules of Appellate Procedure

3. Article 6, Section 139, Constitution of Alabama, 1901

4. Title 46, Section 33, Code of Alabama, 1940

5. Rule 37, Section A, Rules Governing the Conduct of Attorneys in Alabama

6. Rule 3, Section B, Rules Governing the Conduct of Attorneys in Alabama

7. Rule 22, Section B, Rules Governing the Conduct of Attorneys in Alabama

STATEMENT OF THE CASE

The Statement of the Case appearing in the Petition for Writ of Certiorari contains no factual inaccuracies, and Respondent will not restate the same herein, except to observe that Petitioner was given due notice of all proceedings and was represented throughout by able counsel.

SUMMARY OF ARGUMENT

The questions presented for review in the Petition for Writ of Certiorari to the Supreme Court of Alabama in Sullivan v. Board of Commissioners of the Alabama State Bar, 38 U. S. L. Week 1468 (U. S. Oct. 13, 1969) were substantially identical to those which the Petitioner now seeks to present, and this Court should not be required to consider repeated petitions which only differ primarily in phraseology and arrangement.

Disciplinary proceedings against attorneys are not "criminal prosecutions" within the meaning of the Sixth Amendnent, United States Constitution.

The Petitioner is in error in describing the Board of Commissioners of the Alabama State Bar as a "non-judicial body" since Article 6, Section 139, Constitution of Alabama, 1901, expressly provides that such a body may be vested with powers "of a judicial nature" and the courts have held that the Board possesses judicial powers. Ex parte Thompson (1933) 228 Ala. 113, 152 So. 229, Sullivan v. Alabama State Bar, et al., 295 F. Supp. 1221, Aff'd., 394 U. S. 812.

Rule 25, Section A, Rules Governing the Conduct of Attorneys in Alabama, which prohibits an attorney from obtaining a divorce "with knowledge or reasonable cause to believe"

that neither party is a resident merely implements a long established policy that attorneys shall not practice frauds upon the courts and does not deprive "divorce lawyers" of the equal protection of the laws.

The fact that certain members of the Board of Commissioners of the Alabama State Bar voted to propose to the Supreme Court of Alabama for adoption the Rule which the Petitioner was found guilty of violating, although they did not entertain any personal bias against the attorney or preconceived convictions as to his guilt or innocence, did not deprive Petitioner of a fair and impartial tribunal, the Supreme Court of Alabama having affirmed the Board's action without any presumption as to the correctness of the Board's findings.

Title 46, Section 33, Code of Alabama, 1940, expressly provides that the Board of Commissioners of the Alabama State Bar may employ counsel to prosecute before it charges against an attorney, and the Petitioner was not denied due process or a fair hearing because the Board acted pursuant to the terms of this statute.

Depositions are admissible in disciplinary proceedings against an attorney, such proceedings not being "criminal prosecutions" resulting in fine or imprisonment, but having as their sole function the purging of the role of legal practitioners of unworthy members.

Rule 36, Section A, Rules Governing the Conduct of Attorneys in Alabama, which prohibits "any conduct unbecoming an attorney at law" is a valid rule, Rule 3, Section B, providing that an attorney must be charged in writing with a specification of conduct which will fairly and reasonably give the accused information of the acts or offenses complained of.

Petitioner having failed to assert a right to trial by jury in the Supreme Court of Alabama, cannot now assert this alleged right for the first time in the Supreme Court of the United States. There exists no right to trial by jury in a disciplinary proceeding against an attorney since such proceeding is not a "criminal prosecution".

The criminal standard of proof beyond a reasonable doubt is not required in a disciplinary proceeding against an attorney.

The "one man-one vote" rule does not apply to the Board of Commissioners of the Alabama State Bar and there is no unfairness in the composition of said Board, a judicial body.

Both the Board of Commissioners of the Alabama State Bar and the Supreme Court of Alabama are required to consider only "relevant, material, or competent" evidence thus insuring that an attorney's discipline will not be based upon inadmissible evidence.

The fact that a member of the Alabama State Bar presided in the taking of testimony did not result in any unfairness to the Petitioner since the merits of the case were decided by the Board of Commissioners and the Supreme Court of Alabama.

There is no denial of federal due process in the disbarment of an attorney because of his perpetrating a fraud upon the court in the prosecution of a divorce case.

ARGUMENT

This proceeding is somewhat unusual in at least two respects.

First ---- The Supreme Court of Alabama in rendering a decision adverse to the Petitioner as to each question presented relied upon its prior opinion in In re Sullivan (1969) 283 Ala. 514, 219 So. 2d 346, cert. den. Sullivan v. Board of Commissioners of the Alabama State Bar, 38 U.S. L. Week 1468 (U.S. Oct. 13, 1969). As a convenience and aid to the Court a copy of the opinion in In re Sullivan is attached hereto in Appendix infra pp. A-1 through A-22.

Second ---- The Petition for Writ of Certiorari in Sullivan v. Board of Commissioners of the Alabama State Bar, supra, was in many respects identical to the pending petition in the instant proceeding. The only real difference between the two petitions is found in the fact that in Sullivan argument was presented under seven distinct "Questions Presented For Review", whereas in the present proceeding one omnibus "Question Presented For Review" is followed by eleven subdivisions of argument A through K pp. 17-25. As a matter of fact, Question VII in Sullivan was fundamentally indistinguishable from the single question now presented. Question VII in Sullivan read as follows:

"Whether or not the procedures regulating disciplinary proceedings in the State of Alabama, wherein the Board of Commissioners of the Alabama State Bar formulates rules, and acts, directly or indirectly, as accuser, prosecutor, judge and jury, are consistent with the due process clause of the Fourteenth Amendment, United States Constitution."

The question was rephrased in the Brief of Respondent in the following language:

"Does the due process clause of the Fourteenth Amendment, United States Constitution, prohibit the Supreme Court of Alabama from enacting Rules Governing the Conduct of Attorneys in Alabama proposed by the Board of Commissioners of the Alabama State Bar and prohibit said Board from acting through its committees and officers in investigating, charging and determining the guilt or innocence of an attorney of alleged violation of such Rules?"

The other "Questions Presented for Review" in Sullivan and the rephrasing of the same in the Brief of Respondent were as follows:

Petitioner's Question I in Sullivan

"Whether or not a defendant in a state bar disciplinary proceeding, who received the ultimate penalty of disbarment, was tried before a fair and impartial tribunal, consistent with the Sixth and Fourteenth Amendments, United States Constitution, where certain members of that tribunal for determining guilt or innocence had voted previously for adoption of the rule defendant was determined to have violated." (See Section B of the pending petition, pp. 20-21)

Respondent's Question A in Sullivan

"Where the Board of Commissioners of the Alabama State Bar in a disciplinary proceeding, which is not a criminal prosecution, found an attorney guilty of violating one of the Rules of

the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama and the Supreme Court of Alabama affirmed the Board's action without any presumption as to the correctness of the Board's findings, is a substantial constitutional question raised under the Sixth and Fourteenth Amendments, United States Constitution, because certain members of the Board voted to propose to the Supreme Court of Alabama for adoption the Rule which the attorney was found guilty of violating, although they did not entertain any personal bias against the attorney or preconceived convictions as to his guilt or innocence?"

Petitioner's Question II in Sullivan

"Whether or not in a state bar disciplinary proceeding, where the penalty imposed was the ultimate one of disbarment, depositions could be used as evidence against the defendant consistent with the Sixth and Fourteenth Amendments, United States Constitution." (See section D of the pending petition, p. 22)

Respondent's Question B in Sullivan

"Does the use of depositions in a disciplinary proceeding against an attorney, which proceeding is not a criminal prosecution and can result in a reprimand, suspension or disbarment, but cannot result in fine or imprisonment, raise a substantial constitutional question under the Sixth and Fourteenth Amendments, United States Constitution?"

Petitioner's Question III in Sullivan

"Whether Rule 36, Rules Governing the Conduct of Attorneys in Alabama, which condemns

'any conduct unbecoming an attorney at law' and makes an attorney subject to discipline therefor, sufficiently establishes a standard of conduct reasonably ascertainable and definite to afford a constitutional guide or standard for an attorney consistent with the due process clause of the Fourteenth Amendment, United States Constitution." (See Section E of the pending petition, p. 23)

Respondent's Question C in Sullivan

"Do the Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama offend the due process clause of the Fourteenth Amendment, United States Constitution, where Rule 36, Section A, condemns 'any conduct unbecoming an attorney at law', but Rule 3, Section B, requires that a complaint against an attorney must charge in writing 'that such an attorney has violated or failed to comply with one or more of the rules, referring to such rule or rules by the numbers' and with 'such specification of the conduct complained of as will fairly and reasonably give the accused reasonable information of the acts or offenses complained of?' "

Petitioner's Question IV in Sullivan

"Whether an attorney in a disciplinary proceeding prosecuted by a state bar association which resulted in his disbarment is entitled to a trial by jury in accordance with the provisions of the Sixth Amendment, United States Constitution, as the same is made applicable to the State of Alabama by operation of the Fourteenth Amendment, United States Constitution." (See Section F of the pending petition, p. 23)

Respondent's Question D in Sullivan

"Does the Sixth Amendment, United States Constitution, as the same is made applicable to the State of Alabama by operation of the Fourteenth Amendment require a trial by jury in a disciplinary proceeding which is not a criminal prosecution and can result only in a reprimand, suspension or disbarment and not in a fine or imprisonment?"

Petitioner's Question V in Sullivan

"Whether or not an attorney, consistent with the due process and equal probation clauses of the Fourteenth Amendment, United States Constitution, may be proceeded against in a disbarment action where the thrust of the complaint against him is a violation or violations of a rule of conduct of the Board of Commissioners of the Alabama State Bar, approved by the Supreme Court of Alabama, which rule is contra to the interpreted statutory law of the State of Alabama." (We find no specific argument directed to this question in the pending petition, unless the material at pp. 19-20 can be so considered)

Respondent's Question E in Sullivan

"Where the statutory law of the State of Alabama as interpreted by The Supreme Court of Alabama requires that at least one party to a divorce proceeding be a bona fide resident of the State of Alabama, does Rule 25, Section A, Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama, which prohibits attorneys from introducing perjured testimony

on the issue of residency 'with knowledge or reasonable cause to believe' that such testimony is false, raise a substantial federal question under the due process and equal protection clauses of the Fourteenth Amemdment of the United States Constitution?"

Petitioner's Question VI in Sullivan

"Whether or not Rule 25, Section A, as last amended, Rules of the Board of Commissioners of the Alabama State Bar, which rule concerns the granting of divorces in the State of Alabama, is consistent with the freedom of religion clause of the First Amendment, United States Constitution, as the same is made applicable to the State of Alabama by operation of the Fourteenth Amendment, United States Constitution." (We find no argument directed to this question in the pending petition)

Respondent's Question F in Sullivan

"Does the First Amendment of the United States Constitution which prohibits any 'law respecting an establishment of religion, or prohibiting the free exercise thereof'; as made applicable to the State of Alabama by operation of the Fourteenth Amendment, United States Constitution, require a state to permit divorce by the mere consent of the parties and without regard to their residency?"

The Questions Presented For Review in Sullivan v. Board of Commissioners of the Alabama State Bar, supra, as phrased therein by both the petitioner and respondent, are

set forth above in order to illustrate the striking similarity between that proceeding and the pending proceeding. Assuming, arguendo, that a denial of certiorari does not adjudicate the merits of the questions presented, it must be res judicata as to something, i.e., the advisability of granting the writ. This Court's valuable time should not be consumed in considering substantially identical petitions, filed within months of each other, and differing primarily in phraseology and arrangement.

Since the Petitioner has lumped all of his arguments under one all encompassing question, this Brief of Respondent will direct argument to each subdivision of the Petition, seriatim.

At the outset it should be noted that two fallacious premises pervade the Petitioner's entire argument. (a) Petitioner assumes that disciplinary proceedings against attorneys are, or should be treated as, "criminal prosecutions". (b) Petitioner assumes that the Board of Commissioners of the Alabama State Bar is a "non-judicial body".

In view of the fact that these false premises underlie much of the Petitioner's argument, they should be disposed of at the beginning.

(a)

Disciplinary Proceedings Against Attorneys Are Not "Criminal Prosecutions"

We must look to no less an authority than the Supreme Court of the United States for an answer to this question. As early as 1869, in

holding that a judge was not civilly liable for his removal of an attorney as an officer of the Court, this Court in Randall v. Brigham, 74 U.S. 523, described the nature of disbarment proceedings as follows:

> "All that is necessary to their validity is that --- notice should be given to the attorney, of the charges made, and opportunity afforded him for explanation and defense. The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation."

In rejecting the claim that the attorney had been denied certain rights afforded defendants in criminal prosecutions under the Massachusetts Constitution, the court observed:

> ".....It has held that the proceeding taken for the removal of the plaintiff could not, in any just and proper sense, be deemed a criminal procedure, in which a party has a right to a full, formal and substantial description of the offense charged; and that it was not essential to the validity of the order of removal that it should be founded on legal process, according to the signification of the words 'per legam terrae' as used in the Magna Charta, or in the Declaration of Rights."

In discharging a rule to show cause why a disbarment order of a United States District Judge should not be vacated, this Court in Ex parte Wall, 107 U. S. 265, stated:

> "The proceeding is, in its nature, civil, and collateral to any criminal prosecution by indictment. The proceeding is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministrations of persons unfit to practice in them."

Petitioner appears to rely to a large extent upon Pointer v. Texas, 380 U.S. 400, Duncan v. Louisiana, 391 U.S. 145, and Bloom v. Illinois, 391 U. S. 194. These cases are clearly distinguishable.

Pointer is the only case cited by the Petitioner which even touches on the Sixth Amendment right to confrontation. The case merely holds that the transcript of the testimony of a complaining witness given at a preliminary hearing, at which the defendant, a layman, who had no counsel, did not cross-examine, is inadmissible at the defendant's trial for the crime of robbery. The Petitioner in the instant case, an attorney, has been represented throughout all proceedings by able counsel and all witnesses have been subjected to thorough cross-examination.

Duncan involved a criminal prosecution in the classical sense, a simple battery, which under Louisiana law is a misdemeanor punishable by a maximum of two years imprisonment and a $300 fine. The case holds that trial by jury in criminal cases is fundamental to the American scheme of justice and that the Fourteenth Amemdnemt guarantees a right of a jury trial in all criminal cases which -- were they to be tried in federal court -- would come within the Sixth Amendment's guarantee, and that a crime punishable by two years imprisonment is a serious crime requiring a jury trial, and not a mere petty offense.

In Bloom it was held that prosecutions for serious criminal contempts are subject to the jury trial provisions of the Federal Constitution, and the Sixth Amendment, which is made binding on the states by virtue of the due process clause of the Fourteenth Amendment. The defendant's demand for a jury trial had been denied in the state court, and he was found guilty and sentenced to 24 months imprisonment. The opinion carefully notes that a criminal contempt proceeding is exactly parallel to a criminal prosecution in the classical concept, in both its objectives and results.

> ".....serious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution, now binding on the States....."
>
> "Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fines or imprisonment or both....."
> "Criminally contemptuous conduct may violate other provisions of the criminal law; but even when this is not the case convictions for criminal contempt are indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same. Indeed, the role of criminal contempt and that of many ordinary criminal laws seem identical -- protection of the institutions of our government and enforcement of their mandates."

Pointer and Duncan involved "criminal prosecutions" and Bloom was concerned with

criminal contempt which "------is a crime in the ordinary sense -----"

In contrast, all courts have held consistently that an investigation of the conduct of an attorney is not a criminal proceeding.

(b)

Article 6, Section 139, Constitution of Alabama, 1901, provides that a body such as the Board of Commissioners of the Alabama State Bar may be vested with powers of a judicial nature"

In 1933 the Supreme Court of Alabama upheld the validity of the statutes (Title 46, Section 21, et seq., Code of Alabama, 1940) creating the Alabama State Bar and vesting the Board of Commissioners with certain powers and duties. Ex parte Thompson (1933) 228 Ala. 113, 152 So. 229. In the opinion the court quoted from Article 6, Section 139, Constitution of Alabama, 1901, the pertinent part reading: "The judicial power of the state shall be vested in ------such persons as may be by law invested with powers of a judicial nature ------", and observed "Thus we find express constitutional warrant for conferring upon this Board judicial functions; -----"

Section 1 of the Petition For Writ of Certiorari (pp. 15-17) contains the citation of four cases, namely, In re Schlesinger (1963) 404 Pa. 584, 172 A. 2d 835, In re Garland (1866), 71 U. S. 333, Ruiz v. Delgado (CA 1, 1966), 359 F 2d 718, and In re Murchison (1955), 349 U.S. 133.

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(1) In re Schlesinger involved the reversal of an order disbarring an attorney where numerous errors were apparent in the record including the refusal of certain proffered evidence by the accused attorney, erroneous conclusions of law, and insufficient evidence. The most glaring error was found in the fact that the accused attorney was charged by a Committee on Offenses of the Court of Common Pleas and then tried before a Sub-Committee composed of three members of the identical committee which had preferred the charges. Petitioner takes comfort in the language of the opinion that "A disbarment proceeding is every bit as serious as a criminal trial and often more so; --------" A careful reading of the opinion will readily indicate that the court did not, in fact, treat the proceeding as a criminal prosecution, since none of the procedural safeguards peculiar to criminal trials were even alluded to. This is the only case cited by the Petitioner which even goes so far as to draw an analogy between a disciplinary proceeding and a criminal prosecution.

(2) In re Garland dealt with the constitutionality of an act of Congress of 1865 which required a certain prescribed oath from attorneys for continued admission to practice before any United States Court, and defined the exclusion of attorneys from the practice of law as a judicial power. Assuming that the power to exclude from practice before the Federal Courts is the exclusive judicial prerogative of the Federal Courts, we fail to grasp its significance in the instant case.

(3) Ruiz v. Delgado held invalid as a denial of due process a procedure in the Peurto Rico District Court whereby the judge acted as prosecuting attorney in examining and cross-examining witnesses, and thereafter sat in judgment and decided the case. None of the procedures in the present case are even remotely similar to this, and again we fail to see the significance.

(4) In re Murchison condemned the practice whereby the same judge presiding at a contempt hearing had also served as a "one-man grand jury" out of which the contempt charges arose. Again nothing analogous to this appears in the disciplinary proceedings involving the Petitioner.

A

The first portion of division A of the Petition for Writ of Certiorari (pp. 17-19) appears to present an argument that Title 34, Section 29, Code of Alabama, 1940, prior to the amendment thereof in 1945 was unconstitutional. The 1945 proviso dispensed with a one year residency requirement where the defendant is a non-resident "------when the court has jurisdiction of both parties to the cause of action." We fail to comprehend the relevance of this.

Petitioner then quotes from his brief on submission to the Supreme Court of Alabama for the proposition that divorce attorneys are denied the equal protection of the law. Respondent responds with the following quote from its brief:

"Seemingly, the Petitioner has erroneously made the assumptions: (a) that the 'bank lawyer', 'insurance lawyer', 'railroad lawyer', or 'damage suit lawyer' who submits evidence to a court with knowledge or reasonable cause to believe it is false is immune from discipline, whereas the divorce lawyer is subject to discipline; and (b) that the 'divorce lawyer' who obtains a divorce when in fact neither complainant nor respondent is a resident is, ipso facto, subject to discipline. The 'bank lawyer', 'insurance lawyer', 'railroad lawyer', and 'damage suit lawyer' is not permitted to perpetrate fraud upon the court with impunity. The 'divorce lawyer' is not subject to discipline if he innocently obtains a divorce for non residents.

"The 'quickie divorce' racket in Alabama had become a national scandal. Amended Rule 25, Section A, was an expression by the Alabama State Bar through its Board of Commissioners, approved by the Supreme Court of Alabama, that efforts would be made to eradicate the evil.

"The gravaman of the offense condemned by Amended Rule 25, Section A, is the attorney's 'knowledge or reasonable cause to believe' that jurisdiction, the initial access to the courthouse door, is being gained by falsehood.

"Policy has always dictated that lawyers must be disciplined for participating in a fraud upon the courts. Amended Rule 25, Section A, merely implemented that policy when a grave situation arose."

B

The Petitioner does not contend that any member of the Board of Commissioners of the

Alabama State Bar entertained any personal bias as to the Petitioner, and the record reflects that the members of the Board of Commissioners were impartial in this regard. The Petitioner does not contend that any member of the Board of Commissioners entertained any preconceived convictions concerning the Petitioner's guilt or innocence of the charges, and the record reflects that the Commissioners were impartial in this respect.

The bias which would disqualify a member of the Board from sitting and hearing charges against an attorney must be bias personal to the accused attorney, and the mere fact that a member of the Board might favor the particular Rule which the attorney is charged with violating is of no consequence. It might be safely assumed that all members of the Board advocate the enforcement of all of the Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama, and this assumption might equally apply to the Justices of the Supreme Court of Alabama, who adopted the Rules and thus gave them validity.

To insure a fair and impartial tribunal, Title 46, § 25, Code of Alabama, 1940, provides that "If any member of said Board is a party to the preferment of charges for disbarment or suspension of any lawyer, or there exists as against any member of such Board any cause provided by law for the disqualifications of judges or jurors in civil or criminal cases, such member shall be disqualified from sitting as a member of said board in the hearing of such charges." This statutory provision expressly insures to an

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accused attorney a fair and impartial tribunal. The Petitioner does not contend that the statute has not been followed.

Wilson v. State, 243 Ala. 1, 8 So. 2d 422, cited by the Petitioner, involved a criminal prosecution a murder trial, and the alleged bias of the challenged juror was based upon facts completely dissimilar to those in the instant case. Shapiro v. The City of Birmingham, 30 Ala. App. 563, 10 So. 2d 38, also cited by the Petitioner, is completely inapposite; it dealt with the violation of a city ordinance and the challenged juror was an employee of the plaintiff city, a policeman charged with the duty of enforcing the ordinance.

Certainly, no substantial question is posed under the Sixth and Fourteenth Amendments, United States Constitution.

C

True, Title 46, Section 25, Code of Alabame, 1940, contains a provision whereby the circuit solicitor is authorized to prosecute disciplinary proceedings. However, this section must be read in pari materia with Title 46, Section 33, Code of Alabama, 1940, which expressly provides "-------The board of commissioners may appoint counsel to prosecute before it any such complaint or charge so preferred before it against an attorney, and may within its discretion fix and order paid reasonable compensation." Petitioner is careful to state that the counsel for the Bar should not be faulted, but that the Board of Commissioners must be deemed the culprit. The court below stated " -----counsel for Huie ably and vigorously represented him and

filed numerous motions and objections -------"
Both the Board and the Grievance Committee welcomed this. It was in the finest tradition of the Alabama State Bar. A careful review of the record will demonstrate that Petitioner was treated with the utmost fairness and given every opportunity to defend. Petitioner's statement that the proceedings "stink" is somewhat shocking.

D

The Supreme Court of Alabama approved the use of depositions upon the authority of its prior decision, in Sullivan. The courts of other states have held that depositions are admissible in disciplinary proceedings against attorneys, such proceedings not being "criminal prosecutions" resulting in fine or imprisonment, but having as their sole function the purging of the role of legal practitioners of an unworthy or disreputable member. State ex rel. Kehoe v. McRae, 49 Fla. 389, 38 So. 605; State v. Mosher, 128 Iowa 82, 103 N. W. 105.

Clearly the due process clause of the Fourteenth Amendment does not render depositions inadmissible in a proceeding resulting in the revocation of a professional license. In Missouri ex rel. Horwitz v. North, 271 U. S. 40, a Missouri statute was upheld which authorized the State Board of Health to revoke licenses to practice medicine for certain specified causes and provided that: "Testimony may be taken by deposition to be used in evidence at the trial of such charges before the Board in the same manner and under the same rules and practice as is now provided for the taking of depositions in civil cases." Petitioner cites no authority for the proposition that depositions are inadmissible in disciplinary proceedings.

See the discussion of Pointer v. Texas, supra, Duncan v. Louisiana, supra, and Bloom v. Illinois, supra, at pp 16-18 of this Brief of Respondent.

E

Petitioner was found guilty of Charges Seven, Eight, and Nine. Charge Nine alleged a violation of Rule 36, Section A, which condemns "any conduct unbecoming an attorney at law". To test the validity of Rule 36, Section A, it must be read in pari materia with the entire body of the Rules, which describe in Section A the actions on the part of attorneys which are specifically required or prohibited and in Section B, sets forth the method of procedure to be followed in the investigation and trial of complainants.

Rule 3, Section B, provides:

> "It shall be sufficient for any complaint against any attorney to charge in writing that such an attorney has violated or failed to comply with one or more of the rules, referring to some rule or rules by the numbers hereinabove set forth, and such specification of conduct complained of as will fairly and reasonably give the accused reasonable information of the acts or offenses complained of". (Emphasis added).

It is thus obvious that an attorney is afforded an opportunity to (a) establish that he did not perform the acts which are the subject of the complaint, and (b) if the acts are admitted, establish that the acts do not constitute a violation of a specific rule.

The Board of Commissioners of the Alabama State Bar, which promulgated the Rules, and the Supreme Court of Alabama, which approved the Rules and gave them validity, felt that a basically dishonest but ingenious individual might carefully pattern his conduct so as to circumscribe, though narrowly, every Rule other than Rule 36, Section A, and nevertheless, be guilty of conduct which deserved, if not demanded, discipline. It was felt that in dealing with an honorable profession rather than a purely commercial trade, some comprehensive rule was necessary, in order to prevent the fundamentally unethical from carefully avoiding the violation of some specific rule, but whose actions manifestly demonstrated a breach of the high standards demanded of attorneys as officers of the courts.

To demonstrate that other courts are in agreement with this view, we need look to no less an authority than the Supreme Court of the United States. Rule 8, Revised Rules of the Supreme Court of the United States, provides:

> "Where it is shown to the court that any member of its bar .....has been guilty of conduct unbecoming a member of the bar of this court, he will be forthwith suspended from practice before this court." Applied in In re Baker, 297 U. S. 691

Rule 46 (b) Federal Rules of Appellate Procedure, is substantially identical (B-1).

Statutes, rules of court, or rules promulgated by bar associations, which are similar, if not identical, to Rule 36, Section A, Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama, exist in many states. The discipline of a professional group would be difficult, if not impossible, without a rule of similar import.

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The qualities of character which entitle one to become an attorney and officer of courts of a state and a member of the bar of the Supreme Court of the United States must be stated in general terms rather than confined to a series of precise and specific "Thou shalt nots."

"The term 'good moral character' has long been used as a qualification for membership in the Bar and has served a useful purpose in this respect". Konigsberg v. State Bar of California, 353 U. S. 252; Schware v. Board of Bar Examiners of New Mexico, 353 U. S. 232.

Rule 36, Section A. Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama prohibiting "conduct unbecoming an attorney at law," and Rule 8, Revised Rules of the Supreme Court of the United States prohibiting "conduct unbecoming a member of the bar of this court," when measured against a background of experience extending over centuries of development of standards of honesty and fairness of members of an honorable profession is even more definitive than "good moral character", a test for admission to the bar which has been specifically upheld.

In the case of Ex parte Secombe, 60 U.S. 9, a rule to show cause why the peremptory writ of mandamus should not issue commanding the Judges of the Supreme Court of the Territory of Minnesota to restore an attorney to his office was denied. The opinion pointed out that a Minnesota statute described in only general terms some of the offenses for which attorneys might be removed, and observed:

> "Indeed, it is difficult, if not impossible, to enumerate and define, with legal precision, every offense for which an attorney

> or counselor ought to be removed. And the Legislature, for the most part, can only prescribe general rules and principles to be carried into execution by the court with judicial discretion and justice, as cases may arise."

We again emphasize that the Rules must be read as a whole. If an attorney entertains doubts as to the ethical propriety of contemplated action, he is adequately protected by Rule 37, Section A, which provides:

> "But no attorney shall be subject to disciplinary measures for any action on his part, who, prior to such action has received from the Grievance Committee its written opinion that such action was justifiable or permissible."

Petitioner's challenge of Rule 36, Section A, Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama raises no substantial federal question under the due process clause of the Fourteenth Amendment, United States Constitution.

F

The alleged right to trial by jury was never contended before the Supreme Court of Alabama in briefs or in oral argument, and a reading of the opinion below will readily reveal that this proposition was never even considered. Petitioner cannot assert this right for the first time before the Supreme Court of the United States when the

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Supreme Court of Alabama was given no opportunity to pass upon his claim.

The Petitioner again erroneously assumes that the objective and result of an inquiry by the judicial department of a state or the federal government into the qualifications of an officer of the courts is to mete out "punishment". This contention has been emphatically refuted by every court which has addressed the subject. Randall v. Brigham, supra, and Ex parte Wall, supra.

The Supreme Court of the United States and other federal courts have disciplined attorneys as members of their respective bars and no right to trial by jury has been afforded by virtue of the provisions of the Sixth Amendment, United States Constitution, which guarantees such right "In all criminal prosecutions....." The Petitioner does not claim that such right to jury trial existed at common law at the time of the adoption of the Constitution of the United States.

It would present a strange anomaly if the Fourteenth Amendment, which makes the Sixth Amendment applicable to the State of Alabama, required the state courts to afford a jury trial in a disbarment proceeding while the Sixth Amendment, of its own force, imposed no such requirement upon the federal courts.

G

Rule 22, Section B, Rules Governing the Conduct of Attorneys in Alabama states: "The rules of evidence and degree of proof applicable to civil cases shall apply in all cases before the

Board"; that the criminal standard of proof beyond a reasonable doubt is not required is clearly established. Randall v. Brigham, supra; Ex parte Wall, supra.

H

Petitioner observes that Sullivan v. Alabama State Bar, et al., 394 U. S. 812, shows the innate unfairness of the composition of the Board of Commissioners of the Alabama State Bar, "a non-judicial body" (p. 24) The holding of the case is directly contrary to the proposition for which it is cited by the Petitioner. The United States District Court stated "The powers conferred upon the Board of Commissioners of the Alabama State Bar are more judicial than legislative in nature. They were so treated by the Supreme Court of Alabama in the case of Ex parte Thompson, 1933, 228 Ala. 113, 152 So. 229, 238, 239, 107 A. L. R. 671." 295 F. Supp. 1221. The members of the Board are competent men elected by their fellow attorneys from the various judicial circuits. There is nothing magic about a descriptive designation. They are no less able or "learned in the law" because they are denominated "commissioners" rather than "judges" or "justices".

I

Rule 18, Section C, Rules Governing the Conduct of Attorneys in Alabama, limits the Board of Commissioners of the Alabama State Bar to a consideration of only "relevant, material, or competent" evidence, and the Supreme Court of Alabama is similarly limited. Ex parte Montgomery (1943), 244 Ala. 91, 12 So. 2d 314.

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Petitioner's false assumption that the Board is a "non-judicial body" has already been discussed herein.

J

The fact that a member of the Alabama State Bar presided as commissioner at the taking of testimony did not result in any unfairness to the Petitioner. The Board and the Supreme Court of Alabama decided the case upon the merits. See the discussion of this point in Sullivan, appendix hereto, A-15, 16.

K

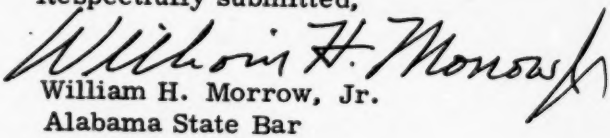
Petitioner departs from the record in this case when he asserts that the Grievance Committee has not proceeded against an attorney unless it could prove at least 50 violations of Rule 25, Section A. Respondent can think of no good reason why the Grievance Committee should wait until an attorney has perpetrated a fraud upon the courts at least 50 times before acting.

CONCLUSION

The Petitioner makes the bald assertion that the procedures employed by the Board of Commissioners of the Alabama State Bar and the Supreme Court of Alabama are strikingly similar to the methods used by the High Commission in England in the latter part of the Sixteenth Century in exposing heretics. This statement by Petitioner demonstrates the absurdity of his position. The Petitioner sets

forth no single novel issue but relies upon a culmination of procedural steps, each of which has been upheld as valid and which insure an accused attorney of every opportunity to prove his innocence of the charges and present any defense available to him. For the reasons stated herein, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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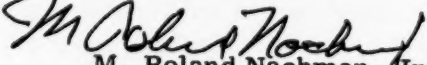

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APPENDIX

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THE STATE OF ALABAMA
THE SUPREME COURT OF ALABAMA
JUDICIAL DEPARTMENT
OCTOBER TERM, 1968-69

3 Div. 277

In the Matter of Thomas W. Sullivan
(Re Thomas W. Sullivan v. Board of
Commissioners of Alabama State Bar)

Petition for Review

PER CURIAM

This is a review of an order or resolution of the Board of Commissioners of the Alabama State Bar finding Thomas W. Sullivan guilty of certain charges preferred against him and disbarring him as a practicing attorney at law.

As originally filed the complaint against Sullivan contained four charges. By subsequent amendments seven additional charges were added to the complaint.

Charge eight was withdrawn, and resolutions of not guilty were entered by the Board of Commissioners as to charges one, two, three, four, ten, and eleven, and resolutions of guilty as to charges five, six, seven, and nine.

Charge five accuses the petitioner of violation of Rule 25, Section A, of the Rules Governing the Conduct

of all Persons admitted to the Practice of Law in the State of Alabama, in that in May or June 1962, the petitioner while serving as a referring or forwarding attorney, did in association with E. C. Boswell, submit to the Inferior Court of Geneva County, Alabama, a divorce case, namely Dominick Rugerrio v. Jean Rugerrio, Case No. A-256, wherein the bill of complaint and deposition of complainant represented to the Court that the complainant was a bona fide resident of the State of Alabama, when in truth and in fact, the petitioner knew, or had reasonable cause to believe, that neither the complainant therein nor the respondent was a bona fide resident of the State of Alabama.

Rule 25, Section A, as amended, reads as follows:

"No person heretofore or hereafter admitted to practice law in Alabama shall

(a) knowingly or willfully make any false representations of fact to any judge, court, or jury to induce a favorable action or ruling by either;

(b) file or prosecute or aid in the filing or prosecution of any suit, cross bill, or proceeding seeking a divorce in a Court in Alabama as attorney or solicitor for a complainant or cross complainant therein or serve as referring or forwarding attorney for such complainant or cross complainant with knowledge or reasonable cause to believe that neither party to such suit, cross bill, or proceeding is at the time of the filing of the bill of complaint or cross bill of complaint therein, a bona fide resident of the State of Alabama;

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(c) While acting as attorney for either party in any suit for divorce in any Court in Alabama represent to the Court or conspire with any party, attorney, or person to represent to the Court that either party to such suit is a bona fide resident of Alabama, knowing such representation to be false."

Charge Six charges petitioner by his acts in connection with the Rugerrio case, with violating Rule 16-A of the Rules Governing the Conduct of all Persons admitted to Practice in this State by introducing or offering to introduce testimony which he knew to be false or forged.

Charge Seven charges petitioner with conduct unbecoming an attorney in violation of Rule 36, Section A, as amended, governing the conduct of attorneys in Alabama.

Charge Nine is to the effect that on, to-wit, 27 December 1965, Mrs. Florence Nichols, then a resident of the State of Delaware, consulted with the petitioner in his office in Montgomery, Alabama, and was advised by petitioner that he could obtain an Alabama divorce for her within the near future. Mrs. Nichols thereupon paid petitioner $650.00 and then returned to Delaware. It is further charged that Mrs. Nichols has made numerous attempts to contact the petitioner by letter and telephone, and obtain information concerning her divorce; that a diligent search of the records of the Bureau of Vital Statistics of the State of Alabama, failed to disclose that petitioner has instituted any proceedings for divorce on behalf of Mrs. Nichols; that the petitioner's

acceptance of a fee from Mrs. Nichols, and his assurance that he would institute and prosecute a divorce action in violation of Rule 25, Section A, as amended, of the Rules of Conduct governing Attorneys in this State, and his failure to respond to inquiries from Mrs. Nichols, constituted conduct unbecoming an attorney in violation of Rule 36, Section A, governing the conduct of attorneys in this state.

Evidence

Charges Five, Six, and Seven (Ruggerio Divorce)

Mrs. Jean Ruggerio testified by deposition taken at Berkeley Heights, New Jersey, that she was a life-long resident of New Jersey. She had married Dominic Ruggerio and for over ten years prior to 10 December 1963, they had resided at Stonehouse Road, Basking Ridge, New Jersey.

On 10 December 1963, Mr. Ruggerio told her he had some papers from Alabama and he wanted her to sign them. He stated he wanted to go to Alabama and get a divorce--that some of his friends had gone to Alabama and gotten a divorce in a matter of a week. Mr. Ruggerio further told her he had seen a doctor and made arrangements to take a two weeks sick leave to go to Alabama to get the divorce.

On the envelope in which the papers were sent was the name Sullivan, though she did not remember the first name.

That night (10 December 1963) she and Mr. Ruggerio went before Harold Thompson (shown by other papers to be a notary public), and she signed the papers. Mr. Ruggerio left their home that night.

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About a week later Mr. Ruggerio called her at her mother's home. He said he was in Newark, and told her that things did not go in Alabama as he expected, and he wanted her to meet him at their home that night and talk things over. She went to their former home that night and Mr. Ruggerio told her he wanted her to return home, forget about everything, and start all over. However, she thought it best that they stay apart for awhile.

On 1 April 1964, she called Mr. Ruggerio at their former home and a girl answered the phone. She asked what she was doing there and the girl told her she and Mr. Ruggerio planned to get married. She asked her how she could when she (Mrs. Ruggerio) had not divorced him.

She called Mr. Ruggerio at his place of employment but he had left to go home. He later called her at her mother's home, and then came there. He handed her a divorce decree stating it was as legal a divorce as she could get.

This decree was rendered by the Inferior Court of Geneva County on 18 January 1964, in the case of Dominic Ruggerio v. Jean Ruggerio, submitted on the complaint of Dominic Ruggerio, and the answer and waiver of Jean Ruggerio, together with an affidavit by Dominic Ruggerio to the effect that he was a bona fide resident of Montgomery, Alabama, residing at 100 Commerce Street, that Jean Ruggerio was a non-resident of Alabama and had voluntarily abandoned him in 1961.

Mr. E. C. Boswell, a practicing attorney in Geneva, Alabama, testified that the Ruggerio divorce case was forwarded to him by the petitioner. Dominic

Ruggerio came to Geneva on 12 December 1963. The witness did not know how long Ruggerio had been in Geneva. Perhaps the petitioner came with him but he did not remember. Jean Ruggerio, to the witness' knowledge, did not come to Alabama. The witness represented Dominic Ruggerio in the divorce proceedings. Ruggerio made an affidavit stating he was a resident of Montgomery, Alabama, and that Jean Ruggerio, his wife, had voluntarily abandoned him on 7 June 1961. Other than the affidavit, the witness made no inquiry as to Ruggerio's residence. Ruggerio gave his testimony before the Register of the Inferior Court of Geneva County on 12 December 1963, and on 18 January 1964, the divorce decree was signed by the judge of said court. Mr. Boswell did not know how long Ruggerio remained in Geneva after appearing before the Register on 12 December 1963.

An affidavit of Judge William F. Thetford, Judge of the Fifteenth Judicial Circuit of Alabama, Montgomery County, was received in evidence. Judge Thetford deposes that he has been such judge since 1 November 1963, specifically assigned to hear domestic relations matters, including divorces. Continuously during his ,tenure the court dockets of said court have been current as to the processing of uncontested divorce cases. In proceedings involving a legitimate uncontested divorce, no more than a few hours, or at most one or two days, is required for disposition of such case.

Charge Nine (Nichols Matter)

Mrs. Florence Nichols, formerly Mrs. Florence Forcelli, testified before Maultsby Waller, the Commissioner appointed to take testimony upon the charges against the petitioner, that she first became acquainted with petitioner in February 1961,

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when she came to Alabama to get a divorce. She was then living in Danbury, Connecticut. On this occasion she was accompanied by Mr. Nichols. She and Nichols went to petitioner's office and she signed some papers. She returned to Connecticut and in April 1961, received from petitioner a copy of the decree divorcing her from Forcelli. Two weeks later she and Nichols were married.

In 1965, Mrs. Nichols had separated from Mr. Nichols and was living in Wilmington, Delaware. In the first part of December 1965, she telephoned petitioner, identified herself as having been Mrs. Forcelli and told petitioner she wanted to come to Alabama and get a divorce. Petitioner told her he would send her some papers in blank for Mr. Nichols to sign before a notary, and that his fee would be $650.00. She received the papers from petitioner and Nichols signed them before a notary public and returned them to her. She was supposed to mail the papers to petitioner who instructed her he would tell her when to come to Alabama.

However, Mrs. Nichols learned that some friends were driving to Tallassee, Alabama, on 24 December, 1965, and she decided to ride down with them.

On 26 December 1965, she drove to Montgomery and called petitioner, telling him she had the executed papers, and the fee, and was told to come to petitioner's office. There she talked with petitioner and signed three sheets of paper which were blank except for her name typed on the bottom.

She asked petitioner when she would "get the papers" (divorce decree) and he told her not to be alarmed if she didn't get them until around February as the judge he was going to get to "do it" was on vacation. Mrs. Nichols paid petitioner $650.00 in

cash, for which he gave her a receipt. The next day she returned to Tallassee, and from there returned to her home in Wilmington, Delaware.

The petitioner did not discuss with her any requirements as to residence in Alabama for divorce purposes.

Not having heard from the petitioner at the end of January 1966, she placed a call to petitioner's office but was told by his secretary he was out.

At the end of March, and again on 12 April 1966, she wrote to petitioner addressing the letters to petitioner's office in Montgomery. The envelopes bore her return address. She stated in each latter that she had not heard anything from petitioner, nor received any papers, and if anything was wrong to please notify her. She further told petitioner that if she were not going to get a divorce, she wanted her money back. She also recounted in her letters her efforts to reach petitioner by telephone. These letters were never answered, nor were they returned to her.

Mrs. Nichols moved from Wilmington back to Connecticut in April 1966, and prior to her departure she left her forwarding address in Wilmington. Since June 1966, she and Nichols have resumed their marital status.

The only witness called by petitioner testified before the Board of Commissioners on 3 March 1966. He testified that on 26 or 27 December 1965, he was in petitioner's office when a woman client came in. Petitioner asked the witness to wait outside his office. As the client left, he overheard her and

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petitioner discussing a divorce and petitioner told the woman her husband would have to sign some papers--that things were pretty hot in Alabama and "he couldn't jeopardize his law practice" and the petitioner discussed residency in Alabama.

On cross examination, the witness stated he did not remember the name of the woman, and he had first discussed this matter with the petitioner about a week before his appearance.

Assignments of Error

Assignment of error 11 is to the effect that the Board of Commissioners erred in overruling petitioner's objections denying the jurisdiction of the Board of Commissioners.

The petitioner, at the opening of the hearing before the Board of Commissioners of the Alabama State Bar, filed a pleading denying the jurisdiction of the Board to entertain the disbarment proceedings. Three grounds, A, B, and C, were set forth in support of the motion.

Ground A sets forth that there is a disparity of members of the Alabama State Bar among the thirty-six judicial circuits of Alabama, and therefore the composition of the Board is unconstitutional.

Ground B asserts that Rule 25, Section A, as amended, is invalid for the reason that the Board was unconstitutionally constituted.

These two grounds are argued jointly. It is petitioner's contention that since each judicial circuit elects one commissioner, and some circuits have a

relative few members of the bar, while others have a large number of members, the composition of the Board is malapportioned and violates the "one man one vote rule."

We have considered the cases cited by appellant in support of his contention above set out, particularly Baker v. Carr, 369 U. S. 186, 82 Sup. Ct. 691, 7 L. Ed 2d 663; Reynolds v. Sims, 377 U. S. 533, 84 Sup. Ct. 1362, 12 L. Ed. 2d 506; Ellis v. Baltimore, 234 Fed. Supp. 945, and others.

We do not consider that the doctrines announced in this line of cases were intended to apply to an association of a professional group, even though organized under the aegis of legislation, but were intended to apply to political governing bodies in the classical sense.

The organization of the Bar for the governing of the legal profession, and the administration of its duties is a matter peculiarly within the province of the Alabama Bar. We hold that the method of electing the Board of Commissioners is in no wise invalid.

The above disposes of petitioner's contention that Rule 25, Section A, as amended, is invalid for the reason that the Board of Commissioners was unconstitutionally constituted, i.e., malapportioned.

We observe, however, that even if it be assumed the petitioner's contention as to malapportionment of the Board contains merit, which we do not concede, it could not aid petitioner as laws passed by an malapportioned legislature are not invalid, Reynolds v. Sims, 377 U.S., supra; Horton v. Bomar, 335 F. 2d 583, nor are acts of a malapportioned county commission invalid, Avery v. Midland County, Texas, 390 U. S. 474, 88 Sup. Ct. 1114, 20 L. Ed. 2d 45, or acts of a

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possibly racially malapportioned draft board, Clay v. United States, (C.C.A. 5), 397 F. 2d 901; Nelloms v. United States, (C.C.A. 5), 399 F. 2d 295.

Further, the Board merely formulates rules, subject to approval by this court. Section 25 (c), Title 46, Code of Alabama 1940. The rules formulated by the Board and submitted to this court are not effective until approved by this court. In its ultimate sense, the Rules of the Bar are therefore the rules of this court, and it cannot be rationally argued that this court is malapportioned since the members are elected statewide.

Ground C of the motion is to the effect that the Board is unconstitutional in that it is instituted in violation of Sections 42 and 43 of the Alabama Constitution of 1901, guaranteeing the separation of powers of government into three magistracies, the legislative, the executive, and the judicial, and further that the Board is instituted in violation of Section 139 of our Constitution relative to vesting judicial power.

These points were decided adversely to petitioner's present contentions in Ex parte Thompson, 228 Ala. 113, 152 So. 229. Counsel for petitioner argues, however, that the decision in Ex parte Thompson is and should be re-examined and overruled. We are not in accord with this view but observe that upon a reading of the lengthy and exhaustive opinion in Thompson, we find nothing that questions its correctness.

Assignment of error III presents the question of the qualification of some eight members of the Board of Commissioners to sit in the present proceedings since they were members of the Board in 1961, at the time when Rule 25, Section A, as amended, was formulated by the Board of Commissioners.

A judge is not disqualified to try a case because he had been a member of the legislature enacting a statute involved in litigation before him, Norton v. Lyon Van and Storage Co., 9 Cal. App. 2d 199, nor does the fact that a prospective juror favors a statute, afford evidence that such juror is biased against a person accused of violating such statute. State v. Sullivan, 97 Wash. 639, 166 P. 1123. See also 48 C. J. S., Judges, Sec. 82, and 50 C. J. S. Juries, Sec. 244. By analogy those members of the Board who were also members at the time Rule 25, Section A was formulated were not, for that reason, disqualified to sit in the present proceedings.

Assignment of error V asserts error because of the action of the Board of Commissioners in denying petitioner's motion to suppress the deposition of Jean Ruggerio.

The grounds of such motion were that if the deposition were taken under the provisions of Title 7, Secs. 457, et seq., the deposition was faulty in that (1) no affidavit as to the necessity for taking such deposition was made before the proper official as required by Section 458 of Title 7, and (2) if the deposition was attempted under the provisions of Title 7, Secs. 474(1), et seq., it should be suppressed for the reason that such codal provisions are inapplicable to disbarment proceedings before the Board of Commissioners of the State Bar.

Counsel for the State Bar concedes that no affidavit was made prior to the taking of the Ruggerio deposition, but contend that the deposition was taken under the provisions of Title 7, Secs. 474(1), et seq. We can therefore lay aside any requirements of Sec. 458, Title 7, Code of Alabama 1940, in considering the point now argued.

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Sections 474(1)-474(18), Title 7, Code of Alabama 1940, appearing as Article 6A, in said Title 7, provides a cummulative method for the taking of depositions.

Section 474(1), Title 7, in parts pertinent to this review, provides:

> "Any party may take the testimony of any person, including a party, by deposition upon the oral examination for the purpose of discovery, or for use as evidence in the action or for both parties."

Section 474(4) provides that at the trial any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition, or who had due notice thereof.

Section 474(7) provides that a reasonable notice shall be given the other party of the time and place of the taking of the deposition, and the name and address of the person to be examined.

It is to be noted that no affidavit is required prior to the taking of a deposition under the provisions of Sections 474(1)-474(18).

On 3 June 1966, a due and proper notice was sent to counsel for petitioner by registered mail that the deposition of Jean Ruggerio would be taken at a specified time and place on 23 June 1966, in Berkeley Heights, New Jersey, before an officer authorized to administer oaths by the laws of New Jersey, for the purpose of discovery or for use as evidence.

The deposition was duly taken in accordance with the notice. The petitioner made no appearance, either by writing, by counsel, or in person.

Section 25 of Title 46, Code of Alabama 1940, found in Article 1 of said Title relating to the organization of the Bar of Alabama, provides that:

> " * * * the evidence of witnesses residing outside such county (county of residence of charged attorney) may be taken in the same manner as provided by law for the taking of depositions in civil cases." (Par. and Underlining ours.)

Likewise Rule 19, Section B of the Rules Governing the Conduct of Attorneys, also provides for the taking of depositions "in all respects as provided by law."

Counsel for petitioner in brief argues that:

> "There then exists serious doubt as to whether the Legislature could constitutionally make * * * Sec. 474(1), et seq., applicable to disbarment proceedings, and it is the position of defendant that to do so would violate his rights under Article 1, Section 6, of the Constitution of Alabama, 1901, and the Sixth Amendment, Constitution of the United States, as the same is made applicable to the State of Alabama by the Fourteenth Amendment."

This argument is succinctly answered by the following quotation from Ex parte Messer, 228 Ala. 16, 152 So. 244, a disbarment proceedings:

> "It is well settled that the rules and principles of the law of evidence applicable to civil proceedings are also applicable to quasi criminal proceedings; that the defendant may be compelled to testify as a witness for the plaintiff, the testimony may be taken by deposition, and the failure of the defendant to testify may be commented on in argument. Smith v. State, 13 Ala. App. 411, 69 So. 406; Miller v. State, 110 Ala. 69, 20 So. 392; Attorney General v. Pelletier, 240 Mass. 264, 134 N. E. 407."

Both Section 25, Title 46, Code of Alabama 1940, and Rule 19, Section B, existed prior to the enactment of Section 474(1), et seq. Each refers only generally to the taking of depositions in the manner provided by law. Section 474(1), et seq., is general concerning the taking of depositions. It will be regarded as adopting by reference, not only the law in force at the time of its enactment, but even later legislation if any, on the subject. See Carruba v. Meeks, 274 Ala. 714, 150 So. 2d 195.

We hold that the Board did not err in denying petitioner's motion to suppress Mrs. Ruggerio's deposition.

Assignment of error VII asserts error by the Board in denying petitioner's objection to Maultsby Waller's appointment by the President of the Alabama Bar as a commissioner to take testimony in the proceedings against the petitioner. The basis of the objection to Mr. Waller so serving was that he was a member of the Alabama Bar.

The interest relied on to disqualify must be a pecuniary one, and be affected by the event of the suit. Ex parte Bar Association, 92 Ala. 113, 8 So. 768. The Board did not err in overruling the objection to Mr. Waller to serve as commissioner to take testimony.

Assignment of error XIII relates to an alleged prejudicial argument made to the Board of Commissioners by Mr. Drayton Scott, representing the Bar, in the proceedings before the Board. Without passing upon whether Mr. Scott's argument exceeded permissible forensic boundaries, we note that it was stated by the presiding officer at the hearing that the Board had considered the matter and had voted to disregard the portion of the argument objected to, and sustained petitioner's objection.

To this, counsel for petitioner stated: "We will let it go at that."

In this state of the record, we find nothing to review. Assignment XIII we consider without merit.

Assignment of error IX is to the effect that the Board of Commissioners erred in overruling petitioner's motion to dismiss the complaint, as amended, against him.

Under this assignment, counsel for petitioner has argued a number of grounds assigned to the motion which we shall discuss in the order presented.

1. Rule 25, Section A, as amended, is invalid and being contrary to interpreted statutory law. Counsel for petitioner concedes that in order

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for a court of this state to have jurisdiction in divorce cases, one of the parties to the marriage must be domiciled in this state. Jennings v. Jennings, 251 Ala. 73, 36 So. 2d 236.

However, counsel argues that in a number of cases (Lutsky v. Lutsky, 279 Ala. 185, 183 So. 2d 782; Levine v. Levine, 262 Ala. 491, 80 So. 2d 235, and Multer v. Multer, 280 Ala. 458, 195 So. 2d 105), this court has denied relief to the party questioning the divorce because of laches or estoppel on the part of the questioning party.

Therefore, counsel contends, the presumption must be that a divorce decree is to all intents and purposes valid until otherwise determined by appeal and it is impossible to state with assurance whether any divorce decree is null and void until tested by appeal.

The fallacy of this argument is that Rule 25, Section A in no way departs from the applicable divorce statutes as to jurisdiction, nor the decisions thereunder, but reinforces these principles. Rule 25, Section A, as amended, was formulated by the Bar, and approved by this court in an effort to eliminate, or lessen, the scandalous "quickie divorce" racket with its local and national ramifications. It is an effort to regulate the ethical conduct of attorneys, and the validity or invalidity of a divorce decree, or the operation of laches or estoppel is beside the point. We find no merit in this contention.

2. Counsel argues that Rule 25, Section A, as amended, is violative of the due process and equal protection provisions of the United States Constitution. It is counsel's contention that the effect of Rule 25, Section A, as amended, is to unreasonably classify "divorce" attorneys separate and apart from other attorneys.

The rule attempts no classification. It merely condemns a practice already contrary to law. It makes crystal clear that no attorney will, in uncontested divorce cases, be permitted to practice fraud upon a court, his client, and society as a whole, by asserting facts of jurisdiction when the attorney knows, or reasonably should know, that no such jurisdictional facts exist.

Counsel also contends that by recognizing the state's interest in divorce matters, the courts are thereby merely continuing the interest of some religious views as to the indissolubility of marriage, thereby imposing religious views in the form of law, in violation of the First Amendment of the United States Constitution.

The fact that society as a whole, and religions, may both have interests in the continuation of marriages by no means violates any provision for the separation of church and state.

The interest of the church is basically an interest in the sanctity of marriage as a holy bond, while the interest of the state is basically materialistic, i.e., support of the wife and children and not casting them upon society for support, though admittedly many decisions in passing recognize the spiritual aspects of the marriage bond.

3. Counsel argues that the Grievance Committee which preferred charges against the petitioner was unlawfully appointed, in that it was appointed by the President of the Bar, rather than by the Board of Commissioners.

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Section 25, Title 46, Code of Alabama 1940, sets forth the broad powers of the Board of Commissioners. Paragraph (e) of the Section authorizes the Board to make rules and by-laws concerning the selection of committees and their powers and duties.

The Board of Commissioners on 5 April 1963, adopted a resolution that the members and terms of the Grievance Committee be fixed by the President. Such action by the Board was authorized by paragraph (f), supra. Authorizing the President to act in the premises merely permitted the President to advantageously perform for the Board a practical detail looking toward the administration of the duties cast upon the Board. No wrongful delegation of powers resulted in this situation.

4. Lastly, counsel for petitioner argues under this assignment that the officers of the Alabama Bar, other than the Board of Commissioners, are without power to act because the members of the Bar must attend the annual convention of the Bar in order to vote for such officials.

The requirement that members of the Bar must vote in person at the annual meeting of the Bar is one well within the administrative powers of the Bar. That some members of the Bar must travel longer distances than others to attend such annual meeting, violates no constitutional right.

Assignment of error XI relates to the action of Mr. Waller, the Commissioner to take testimony, in sustaining on 6 September 1966, petitioner's objection to the hearing being held in Montgomery

County Courthouse, and thereupon continuing the hearing until 1:00 P.M., and transferring the same to the Elmore County Courthouse.

It appears that on 5 August 1966, Mr. Waller was duly appointed Commissioner to take testimony as to the complaints against petitioner, the hearing to be held at Montgomery County Courthouse on 6 September 1966, at 10:00 A.M. The petitioner was served with notice of this hearing on 31 August 1966.

Petitioner and counsel appeared before Commissioner Waller at date set, 6 September 1966, and interposed an objection to the hearing in Montgomery County on the grounds petitioner was a resident of Elmore County. Appearing as a witness solely for the purpose of testifying as to his residence, the petitioner testified that he had maintained a law office in Montgomery County since 1962, though he had had his residence in Elmore County since 1961, and also had an office in his home. In the last election, he had voted in Elmore County. Commissioner Waller thereupon sustained petitioner's objection to the hearing being had in Montgomery County, and continued the hearing to 1:00 P.M., to be conducted in the Courthouse in Elmore County, some 18 miles distant. The petitioner had not subpoenaed any witnesses. At the beginning of the hearing in Elmore County, the petitioner objected to the hearing being had there.

Counsel for petitioner states in brief:

> "This is a question of power to act, not a question of exercise of judicial power to determine whether or not prejudice to the defendant resulted."

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Rule 13, Section B, provides that notice of hearing shall be given an accused attorney of the date fixed for the hearing at least five days prior to the date fixed. Notice of the hearing was given petitioner more than five days in advance.

Rule 15, Section B, provides that upon the day so fixed, the evidence shall be taken at the Courthouse of the county wherein the accused attorney resides.

The above provision is essentially a venue provision for the convenience of the accused attorney. Undoubtedly, it is a matter that could be waived. It in no wise goes to jurisdiction in its true sense to conduct the hearing. The petitioner had subpoenaed no witnesses for the hearing. Because of his objection, the hearing was moved to Elmore County for hearing later in the day. We find no probable injury to any substantial right of the petitioner in the action of Commissioner Waller in the premises.

Assignment of error 1 asserts that the Board of Commissioners erred in entering judgment of disbarment in that the legal evidence adduced is insufficient to support such judgment.

We have carefully read the record in this case and are clear to the conclusion that the legal evidence, and the reasonable inferences therefrom presented to the Board, is ample in its tendencies to support the resolution of guilt entered under

Charges five, six, seven, and nine, and to support the resolution of disbarment.

As we stated in In re McKay, 280 Ala. 174, 191 So. 2d 1:

> "An attorney must be accorded due process in disbarment and disciplinary proceedings, and the requirements of due process are met when the att rney is served with charges or specifications reasonably informing him of the charges against him and the at torney is thereafter accorded a hearing with an opportunity to defend. See 7 Am. Jur., supra, Sec. 64.
>
> "The above requirements of due process being met, formal and technical pleadings are not essential, nor do they have any place in a disbarment proceeding. In re Fite, 228 Ala. 4, 152 So. 246; McCord v. State, 220 Ala. 466, 126 So. 873; Ex parte Thompson, 228 Ala. 113, 152 So. 229, 107 A. L. R. 671; Ex parte Grace, 244 Ala. 267, 13 So. 178."

AFFIRMED.

All the Justices concur, except Lawson, J., not sitting.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

THOMAS W. SULLIVAN, Plaintiff	)	
vs.	)	CIVIL ACTION NO. 2820-N
ALABAMA STATE BAR, a corporate body, ET AL, Defendants.	)	

ON MOTION TO DISMISS AND FOR JUDGMENT ON THE PLEADINGS

Before RIVES, Circuit Judge, and JOHNSON and ALLGOOD, District Judges.

PER CURIAM:

This cause is submitted on a motion to dismiss and for judgment on the pleadings filed by the Chief Justice and Associate Justices of the Supreme Court of Alabama and on a like motion filed by the Alabama State Bar, its Board of Commissioners and Officers.

There can be little or no dispute about the pertinent basic facts as disclosed by the complaint. The Board of Commissioners of the Alabama State Bar was first established in 1923.[1/] The members in good

1/ Code of Ala. of 1940, Recompiled 1957, Tit.46, Sec.21, et seq. Later references to that statute will be simply to the pertinent section of Title 46.

standing of the Alabama State Bar in each judicial circuit of the State select one member of said Board of Commissioners. Sec. 22. Thus, there are 36 State judicial circuits and 36 members of the Board of Commissioners. There are wide variances among the judicial circuits both in total population and in the number of licensed lawyers.

At an annual meeting of the lawyers of Alabama held at such place and time as the Board of Commissioners designate and open to all members of the State Bar in good stand, a president and a first five-president of the State Bar are elected by majority vote by the members of the State Bar present and voting. Sec.24. Broad powers and authority are conferred on the Board of Commissioners, including the following:

"....(c) subject to the approval of the supreme court, to formulate rules governing the conduct of all persons admitted to practice, and to investigate, or cause to be investigated, and to pass upon, all complaints that may be made concerning the professional conduct of any person who has been, or may hereafter be, admitted to the practice of law; (d) subject to the approval of the supreme court, to formulate rules governing the reinstatement of members of the bar who have been disbarred, and to pass upon all petitions for re-instatement; (e) to appoint one or more committees from the membership of the board, or from the membership of the entire Bar, or partly from one and partly from the other....The board shall administer such discipline, by public or private reprimand, suspension from the practice of law, or exclusion and disbarment therefrom, as the case shall, in their judgment, warrant. A majority of the board shall constitute a quorum and the majority of those present (if a quorum be present) shall be empowered to act as and for the entire board. The supreme court may, and on petition of the party aggrieved must, in any case of suspension or dis-

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barment from practice, review the action of the board, and may, on its own motion, and without the certification of any record, inquire into the merits of the case and take any action agreeable to their judgment." Sec. 25 (c), (d) and (e).

In May and June 1964, the Grievance Committee of the Alabama State Bar preferred charges against the plaintiff Sullivan, alleging violations of specified rules theretofore formulated by the Board and approved by the Supreme Court. Additional charges against Sullivan were preferred in 1966. On March 3, 1967, the Board of Commissioners found Sullivan quilty of certain of the charges and ordered his disbarment. Sullivan filed a petition in the Supreme Court of Alabama for certiorari and for a stay of execution of the judgment of disbarment. On March 13, 1967, the Supreme Court of Alabama entered the following order:

> "Petition, having filed in this Court on March 7, 1967, a Petition for Certiorari directed to the Board of Commissioners of the Alabama State Bar to forward to this Court a full and comp lete record of proceedings in this case and to review, revise, reverse and hold for naught that certain judgment of disbarment rendered by the Board of Commissioners of the Alabama State Bar on, to-wit: the 3rd day of March 1967, and Petitioner having filed a petition for stay of the execution of said judgment of disbarment pending this Court's determination of the matters to be presented, and said petition being duly submitted and examined and understood by the Court, it is ordered that the petition for stay be and the same is hereby denied;
>
> "Provided, however, that upon the Petitioner filing in this Court within ten days from this date a sworn affidavit stating that pending the disposition of this matter in this Court he will

not, directly or indirectly, either by himself or in association with another, act or appear as solicitor for complainant or respondent in any divorce proceedings now pending or hereafter filed, a stay of the order of disbarment of the Board of Commissioners of the Alabama State Bar will issue.

"Done this 13th day of March, 1967.

"Livingston, C.J., Lawson, Goodwyn, Merrill, and Harwood, J.J., concur.

"Simpson and Coleman, J.J. would grant a stay of execution of the judgment of disbarment, pending a review of the same, without condition as has here tofore been done in disbarment proceedings."

Sullivan's petition for reconsideration was ordered stricken. He unsuccessfully applied to the Honorable Hugh L. Black, Associate Justice of the Supreme Court of the United States for a stay of execution. Thereafter, he filed the prescribed affidavit, and the Supreme Court of Alabama, on April 3, 1967, issued the following order:

"WHEREAS, on March 13, 1967, this Court did enter an order denying the stay of execution of the judgment of disbarment entered by the Board of Commissioners on March 3, 1967, and

'WHEREAS, petitioner did, on March 28, 1967, file an affidavit called for in the Court's order of March 13, 1967, and through his attorney has petitioned the Court to treat such affidavit as being timely filed in view of the fact that petitioner sought relief in the Supreme Court of the United States by petition, and said petition being denied by Mr. Justice Hugo L. Black on March 24, 1967,

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"NOW, THEREFORE, IT IS ORDERED that the judgment of disbarment entered by the Board of Bar Commissioners on March 3, 1967, be and the same is hereby stayed pending the disposition of the PETITION FOR REVIEW in this Court."

The petition for review of Sullivan's disbarment was argued and submitted to the Supreme Court of Alabama in May 1968, and on January 30, 1969, that Court rendered its opinion and decision affirming the judgment of disbarment.

On November 15, 1968, before the disposition of the petition for review, the President of the Board of Commissioners and the General Counsel of the Alabama State Bar filed in the Supreme Court of Alabama a petition for an order to show cause why Sullivan should not be held in contempt of court for participating in certain named divorce actions. On December 11, 1968, an order to show cause issued from the Supreme Court of Alabama and the date set for hearing was Wednesday, January 8, 1969.

On January 3, 1969, Sullivan filed his complaint in this Court praying for a restraining order, interlocutory injunction and permanent injunction restraining further prosecution or consideration of the contempt proceeding against Sullivan. On the same day, the district judge denied Sullivan's motion for a temporary restraining order. The contempt proceeding is now set for hearing before the Supreme Court of Alabama on February 24, 1969.

Sullivan injects federal constitutional questions by seeking an injunction restraining the enforcement of Sections 22 and 24 of Title 46 of the Code of Alabama. He claims that Section 22 violates the equal protection clause of the Fourteenth Amendment be cause of malapportionment of the Board of Commissioners arising from the wide disparity in population and in numbers

of lawyers in the various State judicial circuits. He attacks Section 24 as denying the equal protection of the laws, because he and other lawyers are required to travel great distances and markedly different distances from their respective homes or places of practice in order to vote for a president and a first vice-president of the State Bar. Sullivan had made these same attacks as a part of his defense in the disbarment proceeding, and in affirming the judgment of disbarment the Supreme Court of Alabama ruled adversely to Sullivan on these questions.

In addition to individual relief as a defense to the contempt proceeding, Sullivan appears in this Court individually and as a champion of the entire State Bar - "on behalf of himself and all other members in good standing of the Alabama State Bar" - and prays: "That in the event the constitutional deficiencies inherent in the Alabama State Bar as now constituted are not remedied forthwith that the Court proceed to correct the deficiencies."

The foregoing statement of this case has necessarily been disproportionately long, and its decision can be relatively brief.

28 U.S.C. Section 2283 provides:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 2/

2/ See Dombrowski v. Pfister, 1965, 380 U. S. 479, 484 n. 2.

The Second Circuit[3/] and the Fifth Circuit [4/] apparently differ as to whether this statute is a clear cut prohibition or establishes only a rule of comity or judicial discretion. Under either construction, it is clear that this Court should not interfere by injunction with the pending contempt proceeding in the Supreme Court of Alabama. [5/] Proceedings to disbar attorneys from practice in the Alabama Courts are peculiarly within the jurisdiction of the Supreme Court of Alabama, free from federal interference.

3/ Stevens v. Frink, 2 Cir.1967, 372 F.2d 378,381 382.

4/ Southern California Petroleum Corp. v. Harper, 5 Cir.1960, 273 F.2d 718; T. Smith & Son, Inc. v. Williams, 5 Cir. 1960, 275 F.2d 397; Dilworth v. Riner, 5 Cir. 1965, 343 F.2d 226.

5/ See Douglas v. City of Jeannette, 1943, 319 U. S. 157, 162; Zwickler v. Koota, 1967, 389 U.S.241, 253; Cameron v. Johnson, 1968, 390 U.S. 611.

6/ See Theard v. United States, 1957, 354 U. S. 278, 281; Gately v. Sutton, 10 Cir. 1962, 510 F. 2d 107.

Sullivan seems to take the position that this case is brought within one of the exceptions to 28 U.S.C. Section 2283, quoted supra, vis.: "... where necessary in aid of its jurisdiction"; and that this Court should prevent or delay his disbarment so that he may continue this suit to correct the constitutional deficiencies which Sullivan claims to be inherent in the Alabama State Bar as now constituted.

There may be several inadequacies of this case as a class action under Rule 23, Fed. R.Civ.P. Certainly the "class" is not properly described as "all members in good standing of the Alabama State Bar," for that includes the beneficiaries as well as the victims of the alleged discrimination. It is doubtful whether a lawyer against whom disbarment proceedings are pending is a "representative party" who can be counted on to "fairly and adequately protect the interests of the class." Rule 23(a), Fed.R.Civ.P. Since these possible inadequacies have not been raised by the defendants, we will treat this as a proper class action for purposes of the present decision.

Assuming that Sullivan had standing either individually or as representative of a class to prosecute this action when the present complaint was filed, we would have some doubt as to whether that standing was lost by the Alabama Supreme Court's subsequent affirmance of the judgment of disbarment, 7/ or will be lost by

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7/ That affirmance does not conclude the litigation, for by supplemental brief Sullivan's counsel informs this Court: "It may be stated that a petition for rehearing shall be filed in the Supreme Court of Alabama within the fifteen (15) day period allowed by the rules of that Court." Of course review may also be sought from the Supreme Court of the United States.

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any judgment that may be entered by the Supreme Court of Alabama in the contempt proceeding.[8/]

8/ See Davis, Standing: Taxpayers and Others, 35 U. Chi. L.Rev.611, 612 (Summer, 1968); 3 Davis, Administrative Law Treatise Sections 22.01 - 22.18. That much is conceded in brief by the Alabama State Bar, its Board of Commissioners and officers:

"If this Court views plaintiff's constitutional challenge to the organization of the Bar Commission as raising a substantial question meriting review by this Court, or one which is inappropriate for judgment on the pleadings, we point out that Mr. Sullivan would have clear standing to raise this constitutional challenge as an attorney in the State of Alabama even if the Supreme Court of Alabama upheld his disbarment. This would be true be cause as a disbarred attorney, plaintiff Sullivan's interest in the Bar Association would not be merely academic. Under Title 46, Section 25, Alabama Code, the Bar Commission is charged with formulating the rules governing the reinstatement of disbarred members of the Bar, subject to the approval of the Supreme Court. Also the Bar Commission is charged with the duty 'to pass on all petitions for reinstatement.' It thus seems clear that even if a member of the general public is viewed as lacking standing to challenge the constitutional formation of the Bar Commission, a disbarred lawyer would have such standing."

In any event a class action cannot be dismissed without the approval of the court and after notice of the proposed dismissal to all members of the class.[9] If that occurs, we cannot assume that every other member of the class will fail to intervene to correct "the constitutional deficiencies in the Alabama State Bar as now constituted," if in truth there by substantial grounds to believe that there are any such constitutional deficiencies. Thus Sullivan's continued presence as plaintiff is not shown to be "necessary" in aid of this Court's jurisdiction.[10] We conclude that this case does not come within any of the exceptions to 28 U.S.C. Section 2283, and that this Court should not grant an injunction to stay the contempt proceedings in the Supreme Court of Alabama.

The appropriateness of declaratory relief rests in the sound discretion of this Court.[11] Out of an abundance of caution and from considerations of public policy, we will assume that Sullivan has properly invoked the jurisdiction of this Court and that, having done so, we are required to consider his federal constitutional claims.[12]

9/ Rule 23(e), Fed.R.Civ.P.

10/ 28 U.S.C. Section 2283.

11/ Eccles v. Peoples Bank of Lakewood Village, Calif., 1948, 333 U.S. 426; Zwickler v. Koota, 1967, 389 U.S. 241.

12/ See England v. Louisiana Medical Examiners, 1964, 375 U. S. 411, 415.

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The Supreme Court of Alabama has held that in reviewing disbarment proceedings "this Court is in the exercise of its original and inherent powers in the matter of disbarment of attorneys at law."[13/] The powers conferred upon the Board of Commissioners of the Alabama State Bar are more judicial than legislative in nature. They were so treated by the Supreme Court of Alabama in the leading case of Ex parte Thompson, 1933, 152 So. 229, 238, 239:

> "We will now address outselves to a consideration of the question whether the Legislature of Alabama acted within constitutional bounds in in creating the board of commissioners of the state bar, and in conferring upon it the powers enumerated in the act. No doubt it was attempted to confer upon the board thus created powers highly judicial in nature. This board is given authority to formulate rules governing the conduct of all persons admitted to practice and to investigate and pass upon all complaints that may be made concerning the professional conduct of any person who has been or who may hereafter be admitted to the practice of the law, and to formulate rules governing the reinstatement of members of the bar who have been disbarred and to pass upon all petitions for reinstatement. The board is empowered to provide for the taking of evidence, and, on hearing of any complaint against an accused attorney, in all cases in which the evidence, in the opinion of a majority of the board, justifies such a course, they are required to take such disciplinary action by public or private reprimand, suspension from the practice of law, or exclusion and disbarment therefrom, as the case shall

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13/ Ex parte Denson, Ala. 1938, 178 So. 484.

in their judgment warrant, provided that in cases of exclusion and disbarment a majority of the board shall vote affirmatively before the exclusion and disbarment shall become effective. But the rules and regulations which may be formulated and adopted by the board shall not become effective until the same shall have received the approval of this court, and the right of this court to approve or disapprove all or any part of the rules so formulated and adopted by the board is fully reserved to this court. More than this, this court is expressly given the right to review on petition of party aggrieved, the action of the board, and may, on its own motion, and without the certification, inquire into the merits of the case, and take any action agreeable to their judgment. If this court should desire it, additional testimony may be taken.

"Section 139 of the Constitution, as presently pertinent, reads:

"'The judicial power of the state shall be vested in the senate sitting as a court of impeachment, a supreme court, circuit courts, chancery courts, courts of probate, such courts of law and equity inferior to the supreme court, and to consist of not more than five members, as the legislature from time to time may establish, and such persons as may be by law invested with powers of a judicial nature.* * *' (Italics supplied.)

"Thus we find express constitutional warrant for conferring upon this board judicial functions; and this conclusion is supported by the decision of this court in the case of State Tax Commission v. Bailey & Howard, 179 Ala. 620, 60 So. 913. We fail to see, in the creation of the board of commissioners of the state bar with the powers

conferred, any transgression of constitutional bounds by the Legislature, and, as for any constitutional objections assigned, and here argued, we hold that the act does not violate any of the provisions of the Constitution urged and assigned by appellant."

This it appears that the State Supreme Court, in the exercise of its original and inherent powers in disbarment proceedings, can remedy any errors committed by any claimed malapportionment of the Board of Commissioners. Moreover, assuming any such malapportionment to exist, the acts of the Board of Commissioners are nonetheless acts of a de facto authority and valid.[14/]

Finally, this case might be more briefly and properly disposed by laying aside all procedural obstacles and deciding Sullivan's federal constitutional claims. He asks this Court to extend the "one man, one vote" requirement far beyond the holdings of the Supreme Court in Reynolds v. Sims, 1964,

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14/ Cassius Marsellus Clay, Jr. v. United States, 5 Cir. 1968, 397 F.2d 901; Nelloms v. United States, 5 Cir. 1968, 399 F.2d 295; Sellers v. McNamara, 5 Cir. 1968, 398 F.2d 893; Simmons v. United States, 5 Cir. 1969, _____F.2d ____(No.25371, decided Jan 9, 1969); Schaefer v. Thomson, D. Wyo., 251 F.Supp. 450, 453, aff'd, Harrison v. Schaefer, 1966, 383 U. S. 269; Ryan v. Tinsley, 10 Cir. 1963, 316 F.2d 430, 432; Dawson v. Bomar, 6 Cir. 1963, 322 F.2d 445; Horton v. Bomar, 6 Cir. 1964, 335 F.2d 583; Sims v. Frink, M.D. Ala. 1962, 208 F.Supp. 431, aff'd, Reynolds v. Sims, 1964, 377 U.S. 533; Fortson v. Morris, 1966, 385 U. S. 231, 235.

377, U. S. 533, and Avery v. Midland County, Texas, 1968, 390 U.S. 474, 88 S.Ct. 1114. The Supreme Court has held that the "one man, one vote"principle has no relevancy to the choice of members of a county school board, a non-legislative office.[15] Lower courts have reached the same result as to various governing bodies of limited-purpose districts and as to members of the executive or judicial branch.[16] As has been indicated, the powers of the Board of Commissioners here under attack may more accurately be classed as judicial than as legislative. If there is any unjust malapportionment, it can be corrected by the State Legislature, which itself is no longer afflicted with the malady of malapportionment.[17] We hold that the constitutional principle of "one man, one vote" has no relevancy to the Board of Commissioners of the Alabama State Bar.

Sullivan's attack on Section 24 does not, in our opinion present a substantial constitutional question. It is elementary that the equal protection clause of the Fourteenth Amendment is aimed only at unreasonable or invidious differences.[18] The presumption is that discriminations in state legislation are based on adequate grounds.[19] In the light of all of the

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15/ Sailors v. Board of Education, 1967, 387 U.S.105, 111.

16/ See Annotation on Applicability of "One Man - One Vote" Rule, 18 L.ed.2d 1537, 1541, 1543.

17/ See Sims v. Frink, M.D. Ala.1962, 208 F.Supp. 431, aff'd, Reynolds v. Sims, 1964, 377 U.S.533; Sims v. Baggett, M.D. Ala. 1965, 247 F. Supp. 96.

18/ Lindsley v. Natural Carbonic Gas Co., 1911, 220 U. S. 61.

19/ Middleton v. Texas Power & Light Co., 1919, 249 U. S. 152, 157; Madden v. Kentucky, 1940,309 U.S.83.

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advantages which flow from a face-to-face discussion of the many problems confronting the organized bar, the Alabama Legislature clearly acted within its constitutional power in requiring an annual meeting of the integrated State Bar for the purpose of electing a president and vice-president.

Accordingly, it is the order, judgment and decree of this Court that each of the motions of the defendants to dismiss be and the same is hereby granted, and the complaint is hereby dismissed. The costs are taxed against the plaintiff.

Done this the 4th day of February 1969.

s/Richard T. Rives
United States Circuit Judge

s/Frank M. Johnson, Jr.
United States District Judge

s/Clarence W. Allgood
United States District Judge

APPENDIX

B-1

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

I.

Rule 8, Revised Rule of the Supreme Court of the United States

Where it is shown to the court that any member of its bar has been disbarred from practice in any State, Territory, District, Commonwealth, or Possession, or has been guilty of conduct unbecoming a member of the bar of this court, he will be forthwith suspended from practice before this court. He will thereupon be afforded the opportunity to show good cause, within forty days, why he should not be disbarred. Upon his response to the rule to show cause, or upon the expiration of the forty days if no response is made, the court will enter an appropriate order; but no order of disbarment will be entered except with the concurrence of a majority of the justices participating.

II.

Rule 46 (b), Federal Rules of Appellate Procedure

(b) Suspension or Disbarment. When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, he will be subject to suspension or disbarment by the court. The member shall be afforded an opportunity to show good cause, within such time as the court shall prescribe, why he

should not be suspended or disbarred. Upon his response to the rule to show cause, and after hearing, if requested, or upon expiration of the time prescribed for a response if no response is made, the court shall enter an appropriate order.

III.

Article 6, Section 139, Constitution of Alabama, 1901

Section 139. The judicial power of the state shall be vested in the senate sitting as a court of impeachment, a supreme court, circuit courts, chancery courts, courts of probate, such courts of law and equity inferior to the supreme court, and to consist of not more than five members, as the legislature from time to time may establish, and such persons as may be by law invested with powers of a judicial nature; but no court of general jurisdiction, at law or in equity, or both, shall hereafter be established in and for any one county having a population of less than twenty thousand, according to the next preceding federal census, and property assessed for taxation at a less valuation than three million five hundred thousand dollars.

IV.

Title 46, Section 33, Code of Alabama, 1940

Discipline; prosecution and procedure. The board of commissioners shall establish rules governing procedure in cases involving alleged professional misconduct of members of the state bar. The grievance committee of the Alabama

state bar, or the grievance committee of a circuit county or city association, established or approved by the Alabama State Bar, or its board of commissioners, shall have the power and authority to investigate any alleged professional misconduct of a member of the state bar, whether or not charge or complaint therefor be made or referred to it, and to report its findings or recommendations to the board of commissioners, or to prefer complaint or charge thereon against the accused attorney at law before the board of commissioners for trial thereof, and to prosecute to decision the said complaint or charge before the board of commissioners, and the duty is imposed upon said board of commissioners of considering such findings or recommendations, and of hearing and determining such complaint or charge. Such grievance committee is hereby empowered to take testimony under oath in any such investigation, or the board of commissioners or such grievance committee may designate any person as commissioner to take testimony under oath in any such investigation whose compensation for the services so rendered may be fixed and ordered paid by the board of commissioners at its discretion. Such board of commissioners or any member thereof of such grievance committee or any member thereof shall not be required to give any security for costs and shall not be liable for any costs or damages to the accused attorney incident to such investigation, report, complaint, charge, prosecution or trial. The board of commissioners may appoint counsel to prosecute before it any such complaint or charge so preferred before it against an attorney, and may within its discretion fix and order paid reasonable compensation for the services so rendered by such counsel. And it shall be the duty of the sheriff

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of the state or of any lawful officer thereof to serve such writs, subpoenas, or other papers in connection with the investigation, hearing and determining of such complaint or charge as may be placed in his hands by said board of commissioners or said grievance committee or any person designated hereunder as commissioner to take testimony in such investigation or any counsel appointed by the board of commissioners to prosecute before it such complaint or charge or the accused or his or her attorney; subpoenas, writs or other papers hereunder may be served by sending copies thereof to the proper parties by registered mail and the return receipts of such writs, subpoenas or other papers, signed by the party to be served, shall be construed to be as personal, sufficient and legal service of all such writs, subpoenas or other papers.

V

Rule 37, Section A, Rules Governing The Conduct of Attorneys in Alabama

A member of the State Bar shall not appear on behalf of a client before a public officer, board, committee or body, or any member thereof, that he is an attorney representing such client.

Any attorney who shall do or be guilty of any of the acts forbidden or prohibited by any of the foregoing rules of Section (A) hereof may be the subject of disciplinary action by public or private reprimand or by suspension from the practice of law or by exclusion and disbarment therefrom.

An attorney must be disbarred and excluded from the practice of law for any one of the following causes:

(a) When any judgment is rendered against him for money collected by him as attorney upon which judgment an execution has issued and been returned no property, in which case the record of the judgment and execution or a copy thereof certified and authenticated in the manner authorized by law is conclusive evidence, unless such judgment has been set aside, reversed, or annulled.

(b) Upon his being convicted under a plea of guilty, a plea of not guilty, a plea of nolo contendere or any other plea by any Court of record of this State or of the United States or of any other State of any crime which by the law of the forum trying the case is a felony, in either of which cases the record of his conviction or a copy thereof certified and authenticated in the manner authorized by law is conclusive evidence.

But no attorney shall be subject to disciplinary measures for any action on his part who, prior to such action, has received from the Grievance Committee its written opinion that such action was justifiable or permissable.

VI

Rule 3, Section B, Rules Governing The Conduct of Attorneys in Alabama

It shall be sufficient for any complaint against any attorney to charge in writing that such an attorney has violated or failed to comply with one or more of the rules, referring to such rule or rules by the numbers hereinbefore set forth, and such specification of the conduct complained of as will fairly and reasonably give the accused reasonable information of the acts or offenses complained of.

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VII

Rule 22, Section B, Rules Governing The Conduct of Attorneys in Alabama

The rules of evidence and the degree of proof applicable to civil cases shall apply in all cases before the Board.